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NO. 84-6780

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WILLIAM ALVIN SMITH,

Petitioner,

v.

ROBERT O. FRANCIS, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

I.

Whether this Court should grant a writ of certiorari to examine an Eighth Amendment claim not addressed on its merits either by the Supreme Court of Georgia or by the state habeas corpus court?

II.

Whether this Court should grant a writ of certiorari to determine whether a definitional charge regarding "implied malice," in relation to circumstantial evidence, was unconstitutionally burden-shifting, where both the Supreme Court of Georgia and the state habeas corpus court rejected the Petitioner's claim?

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PART ONE

STATEMENT OF THE CASE

Petitioner, William Alvin Smith, was convicted in the Superior Court of Oglethorpe County, Georgia, on September 15, 1981, for the malice murder and armed robbery of Daniel Lee Turner. At the sentencing phase of Petitioner's trial, the jury recommended a sentence of death after finding the seventh statutory aggravated circumstance as defined by O.C.G.A. § 17-10-30 (b)(7); Ga. Code Ann. § 7-25-34.1 (b)(7). The Petitioner was thereafter sentenced to death for the murder of Daniel Lee Turner, and to life imprisonment for the offense of armed robbery.

The Petitioner appealed his conviction and sentence to the Supreme Court of Georgia, which reviewed the case and affirmed the Petitioner's convictions and sentences. Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982). Petitioner's application for a writ of certiorari from this Court, as well as his

petition for rehearing in this Court, was denied. Smith v. Georgia, 459 U.S. 882, rhng. denied, 459 U.S. 1060 (1982).

Petitioner subsequently filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, alleging, among other allegations, that the trial court's instructions on malice were impermissibly burden-shifting and that the sentence of death imposed in this case was disproportionately severe and excessive because of the Petitioner's alleged mental condition. On April 16, 1984, the Superior Court of Butts County denied the petition for habeas corpus relief finding that the trial court's instructions on malice were not either unconstitutional or in contravention of state law, and that the state habeas corpus court was precluded from reviewing the Petitioner's claims of disproportionality because this issue had been previously decided by the Supreme Court of Georgia on direct appeal.

On August 9, 1984, the Supreme Court of Georgia granted the Petitioner an application for a certificate of probable cause to appeal the decision of the state habeas corpus court. The Petitioner's case was docketed, briefs were submited for both parties and oral argument was presented. On January 29, 1985, the Supreme Court of Georgia affirmed the decision of state habeas corpus court. Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985). The Supreme Court of Georgia addressed itself to the Petitioner's claims regarding the alleged ineffectiveness of his trial attorney and to the trial court's instructions to the jury on mitigating evidence during the sentencing phase of the trial. Id. at 782-87. The Supreme Court of Georgia did not specifically address either issue raised in the instant petition for certiorari, but instead stated:

> The order entered by the habeas court dicusses each of the remaining issues raised by Smith. We affirm the conclusion of that court that none of them merit relief.

Id. at 787(3).

Petitioner now seeks a writ of certiorari from this Court to review that affirmance of the state habeas corpus court's decision.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE STATE HABEAS CORPUS COURT PROPERLY CONCLUDED THAT PETITIONER'S EIGHTH AMENDMENT CLAIM THAT HIS DEATH SENTENCE WAS DISPROPORTIONATE WAS WITHOUT MERIT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The Petitioner contends in the first ground of his petition that the infliction of capital punishment on a mentally retarded offender is unconstitutional. Respondent submits that this allegation was not addressed by the courts below, but was instead found to be without merit based upon an independent and adequate state law ground.

In paragraphs 86-90 of the state habeas corpus petition, the Petitioner alleged that his death sentence was disproportionately severe and therefore was excessive punishment because the Petitioner was allegedly a mental retardate. The state habeas corpus court did not address the merits of this claim. Instead, the state habeas corpus court found that the Supreme Court of Georgia had previously conducted a review of the Petitioner's death sentence on direct appeal, and found the sentence not excessive or disproportionate. See state habeas corpus court order, page 29. See also Smith v. State, 249 Ga. at 235. As the state habeas corpus court found that the Supreme Court of Georgia had already reviewed this issue during the Petitioner's direct appeal, the state habeas corpus court held that this prior review was binding for the purposes of the habeas corpus action. See Habeas corpus order, page 29.

On its review of the state habeas corpus court order, the Supreme Court of Georgia affirmed without opinion this conclusion by the lower court. Smith v. Francis, 253 Ga. at 787(3).

Under Georgia law, issues covered on direct appeal are not cognizable in a state habeas corpus proceeding. After an appellate review has been conducted, the same issue will not be reviewed again in any proceeding on a writ of habeas corpus in state court. Treadwell v. Hopper, 235 Ga. 241, 219 S.E.2d 155 (1975); Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974).

The decision sought to be reviewed then in the instant case is the state habeas corpus court's holding that it was precluded from reviewing the Petitioner's claims on the merits. This decision by the state habeas corpus court was based purely upon an interpretation of state law. This Court has long declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination merely because a federal question is involved. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 118 (1944). The adequate state ground in the instant case is the state procedural requirement prohibiting a state habeas corpus court from addressing issues already decided on direct appeal. The state ground relied upon in the instant case clearly serves a legitamate state interest by establishing the finality of an appellate court decision. As this requirement does not discriminate on the grounds that a federal question has been raised, the decision of the state habeas corpus court properly relied on an adequate and independent state ground.

Petitioner has inappropriately raised the issue of alleged disproportionality in the instant case. This issue would have been more properly raised in the Petitioner's first petition for certiorari to this Court upon the affirmance of his conviction and sentence by the Supreme Court of Georgia in 1982. The only decision presented to this Court for review in the instant case is whether or not the state habeas corpus court properly declined to review the merits of the Petitioner's claims based upon state procedural law. The Petitioner has failed to show that the disposition of any

federal question in the instant case was necessary to the decision of the state habeas corpus court, and therefore Respondent urges this Court to decline to consider this issue. Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

II. THE TRIAL COURT'S DEFINITION TO THE JURY OF "IMPLIED MALICE," IN RELATION TO THE CIRCUMSTANTIAL EVIDENCE AT TRIAL, WAS NOT UNCONSTITUTIONAL.

The Petitioner contends that the trial court's definition of "implied malice" was unconstitutionally burden-shifting. Respondent submits that the charge in the instant case was not burden-shifting, but instead was merely the definition of implied malice as it related to circumstantial evidence presented at trial.

At the Petitioner's trial, the trial court defined "malice" as follows:

> I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that of deliberate intention to take away the life of a fellow creature. Malice would be implied where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart. Legal malice is not necessarily ill will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time the killing is alleged, but it is not necessary for that intention to have existed for any length of time before the killing.

(T. 336).

The state habeas corpus court recognized that any single instruction to the jury may not be judged in isolation, but must be viewed in the context of the overall charge, in

accordance with Cupp v. Naughten, 414 U.S. 141 (1973). Therefore, the state habeas corpus court did not limit its review of the trial court's charge merely to the portion challenged by the Petitioner in paragraphs 62 and 63 of the habeas corpus petition, but instead reviewed the trial court's entire charge to the jury. (See Habeas corpus order, page 24). After making this review, the state court found no violation of the Petitioner's constitutional rights and no conclusive presumption presented by the charge. Id. at 24-25. Instead, the habeas corpus court noted:

> [T]he trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt. (Cites omitted). It does not appear to this Court that any reasonable juror would infer a burden on Petitioner to prove a lack of malice given the trial court's instructions as a whole.

Id. at 25.

In reviewing this decision by the state habeas corpus court, the Supreme Court of Georgia affirmed the lower court holding without any elaboration. Smith v. Francis, 253 Ga. at 787(3).

The Supreme Court of Georgia had already reviewed this identical allegation, as well as the "burden-shifting" claim based on Sandstrom v. Montana, 442 U.S. 510 (1979), in the case of Walden v. State, 251 Ga. 505, 506(1), 307 S.E.2d 474 (1983). As noted by the Supreme Court of Georgia in Walden, the charge in question does not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. Instead the charge leaves the jury free to credit or reject the inference and does not shift the burden of proof. Id. Citing,

Stephens v. State, 247 Ga. 698, 706, 278 S.E.2d 398 (1981), cert. denied, ___ U.S. __, 103 S. Ct. 3551 (1981); Tucker v. State, 245 Ga. 68, 70, 263 S.E.2d 109, cert. denied, 449 U.S. 891 (1980).

As the habeas corpus court also noted, this identical charge has been reviewed by the United States Court of Appeals for the Eleventh Circuit, and has been found constitutional. Lamb v. Jernigan, 683 F.2d 1332, 1340 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983). The Court of Appeals noted that the charge in the instant case was not burden-shifting, and was instead really a directive to the jury that the finding of malice must often be based entirely on circumstantial evidence, that is that the jury was not entitled to refuse to find malice soley because direct evidence of malicious intent is lacking. Id. The Court of Appeals found that the instructions did not expressly relieve the prosecution of proving circumstances that indicate malice nor did it reduce such burden to something less than beyond a reasonable doubt. Id. Though the instruction in isolation did not seem precise or clear, in view of the trial court's instructions on circumstantial evidence, the Court of Appeals found that no reasonable juror would have interpreted the charge in question as changing the reasonable-doubt burden of proof, which the jurors were instructed the prosecution had to meet. Id.

The Eleventh Circuit recently reiterated its position in Lamb and concluded that viewing the instructions of the Court as a whole, reasonable jurors would not interpret the charge on implied malice as burden-shifting. See Jarrell v. Balkcom, 735 F.2d 1242, 1256 (11th Cir. 1984).

Respondent submits that the state habeas corpus court, the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have correctly interpreted the instant charge on implied malice and have correctly concluded that it is not unconstitutionally burden-shifting under the guidelines of Sandstrom v. Montana, supra.

As in Lamb, the trial court here had given an extensive charge to the jury regarding circumstantial evidence. (T. 331). This was followed by the trial court's definition of both express and implied malice, which is the portion of the charge challenged in the instant case. Given the correct interpretation of the law as noted above, the trial court's instructions in the instant case were not unconstitutionally burden-shifting. Accordingly, the Petitioner has failed to establish any merit to this claim in the instant case.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there is no federal question for review by this Court as to the Petitioner's claims, and further, there is no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is demonstrably in accord with the applicable decisions with this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent hereby certify that, in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with the proper address and adequate postage to:

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